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December 17, 2015

County of San Diego
Planning and Development Services
5510 Overland Avenue
Suite 310
San Diego, CA 92123

Via Hand Delivery

Re: Appeal to Board of Supervisors of Case No. PDS2015-AA-15-003; Covert Canyon SAEO Submitted on behalf of Appellants Robin and Clark Williams; Environmental Groups: Cleveland National Forest Foundation; Save Our Forest and Ranchlands, and Coastal Environmental Rights Foundation.

Dear Planning and Development Services:

Pursuant to San Diego County Code of Regulatory Ordinances (SDCCRO) section 86.401 *et seq.*, please accept this correspondence as an appeal of Planning and Development Services staff's October 28, 2015 decision to approve Covert Canyon's Stipulated Administrative Enforcement Order (Case No. PDS2015-AA-15-003) absent review under the California Environmental Quality Act (CEQA). In the alternative, it may be considered an appeal of the Planning Commission's December 11, 2015 environmental determination that the Covert Canyon is not subject to the CEQA. This appeal is submitted on behalf of Robin and Clark Williams, Save Our Forest and Ranchlands, Cleveland National Forest Foundation, and Coastal Environmental Rights Foundation (collectively, "Appellants").¹

The grounds for appeal, and supporting documentation, are included in the administrative record for Case No. PDS2015-AA-15-003. The administrative record on appeal, and subsequently for litigation if the Board of Supervisors upholds Planning Staff's and the Planning Commission's determination, will include the entirety of documentation contained in the Planning and Development Services files related to Covert Canyon (including all such documents and communications pertaining to Covert Canyon's 2007 Major Use Permit application, all complaints and evidentiary submissions to County Code Enforcement, and all other documents in the files of County Code Enforcement related to actions taken or decisions not to act. The administrative record includes: (a) any and all evidence considered by the Director in making the determination to find Covert Canyon's proposed use

¹ SDCCRO section 86.404(e) requires an appeal to be filed within 10 days after the date of an environmental determination or the associated project decision, whichever is later. Section 86.403(b) provides for the filing of an appeal only after exhaustion of administrative appeals related to the project decision. Thus, the appropriate timing for the appeal is within 10 days of December 11, 2015.

consistent with the SDCZO section 1346 Law Enforcement Services use category; and (b) any and all evidence considered by the Director when he determined that Covert Canyon's proposed temporary uses would not result in "Major Impacts" as that term is used in SDCZO section 1350.). A certified transcript of the Planning Commission hearing should also be included in the appeal record.

Appellants' Contentions on Appeal

1. The decision to reclassify Covert Canyon's outdoor shooting range and firearms training as consistent with the SDCZO section 1346 Law Enforcement Services use classification was a discretionary legislative action, the impacts for which were required to be studied pursuant to CEQA prior to the Director finalizing such decision. The legislative decision to amend section 1346 to include outdoor firearms training may result in a physical change to the environment of every parcel where the Law Enforcement Services use is allowed. The reclassification of use may result in a physical change to the environment at and in the vicinity of Covert Canyon, as discussed in the evidence submitted by Appellants to the Planning Commission, and as noted by Commissioners themselves with respect to noise and other impacts. The County did not conduct CEQA review for the reclassification decision.
2. The issuance of the SAEO was a discretionary project approval subject to CEQA in that it granted a temporary right to conduct activities that are legally subject to a subsequent discretionary permitting process (which staff admits will entail CEQA review). The approval of temporary authorization to conduct firearms training pursuant to the SAEO was illegally piecemealed from consideration of the Site Plan permit required by SDCZO section 6905, or in the alternative, the discretionary Major Use Permit required for the section 1350 Major Impact Services and Utilities use applicable to Covert Canyon. The temporary authorization to conduct firearms training pursuant to the SAEO may result in a physical change to the environment as discussed in the evidence submitted by Appellants to the Planning Commission, and as noted by Commissioners themselves with respect to noise and other impacts. The County did not conduct CEQA review for the temporary impacts associated with the SAEO.

From the correspondence submitted to the Planning Commission by Appellants, please specifically consider the following excerpts as a description of grounds for this CEQA appeal to the Board of Supervisors:

First, the so-called conditions of the SAEO create a new right for Covert Canyon that did not previously exist. While the staff report does almost nothing to describe the long history of violations at the site, the years of communication with neighbors and environmental groups regarding the violations, or the mountain of evidence transmitted to County staff, the fact remains that this is resolving one or more outstanding enforcement actions, and creates a new outline for the activities and impacts that will occur at Covert Canyon. Therefore, the scope of activities to be allowed at Covert Canyon directly relates to the propriety of discretion exercised by the Director in reinterpreting the applicable use classification from Major Impact Services and Utilities to Law Enforcement Services.

Second, the County has now created a new, enhanced definition of the Law Enforcement Services use. Through his discretionary review of the Covert Canyon circumstances, and determination that the uses approved in the SAEO qualify as such, the Director has set a new precedent for the scope of activities applicable to each and every zone that allows Law Enforcement Services. The SDCZO Use & Enclosure Matrix identifies all of the zones that allow for the Law Enforcement Services use, but among the more sensitive (in addition to A72) are the Rural Residential, Limited Agriculture, and General Rural zones. Therefore, before the firearms training uses can be applied to the Law Enforcement Services use, the County must consider the full scope of impacts that would occur throughout the County if law enforcement and military firearms training are allowed on each and every parcel of land where such permission might reasonably be sought. Arguably, the County will now be required to allow any such property owner to conduct commercial firearms training on an interim basis so long as a permit application is eventually submitted.

Notwithstanding disagreements between appellants and the County with regard to the appropriateness of the SDCZO 1346 use classification for activities in the SAEO, addressed further below, the County simply does not have the authority to issue the SAEO without first conducting CEQA review. Put another way, the County cannot delay environmental review by piecemealing purported ministerial or “non-project” approvals and those for future, admittedly discretionary permits.

There can be no credible dispute that even under the County’s new scheme, in order for Covert Canyon to permanently conduct Law Enforcement Services provided for in the SAEO, it will subsequently be required to obtain a discretionary Site Plan or Major Use permit. SDCZO 2720, et seq. identifies the permitted uses for the A72, “General Agricultural” zone. Section 2722 identifies “Law Enforcement Services” and references section SDCZO 6905. Section 6905 prescribes additional requirements applicable to law enforcement services in the A72 zone.

SDCZO 6905 requires “Site Plan review in accordance with the Site Plan Review Procedure commencing at Section 7150,” including review and evaluation of the Site Plan by the Director, with content to be included as determined by the Director. Another way of putting it-- the Director will exercise discretion when dictating the information to be included in the Site Plan, and will exercise discretion to ensure all elements of the proposed law enforcement services “are consistent with the intent and purpose and meet the requirements of this section and applicable zone requirements.” (See SDCZO 6905(c)). The Director is empowered to condition the Site Plan to ensure buildings and structures are located in such a way that they appear attractive, and are “agreeably related to surrounding development and the natural environment.” The Director is

charged with ensuring earth-moving and grading are executed so as to blend with the existing terrain both on and adjacent to the site. (Id.).

The general provisions of SDCZO 7150 et seq. would also apply to the subsequent process, and are intended “to provide a review procedure for development proposals which is concerned with physical design, siting, interior vehicular and pedestrian access, and the interrelationship of these elements.” The Director is responsible for administering the procedure and for reviewing and evaluating all Site Plans. (SDCZO 7154, 7158). The Director is expressly empowered to exercise discretion when approving Site Plans, and to “eliminate or mitigate significant adverse environmental effects disclosed by an environmental impact report.” (SDCZO 7158(b)). The Director must make findings that the proposed development meets the intent and specific standards and criteria of the relevant zoning ordinance, and that the proposed development is consistent with the General Plan. The Director has broad discretion to approve or modify Site Plans pursuant to conditions it deems “reasonable and necessary or advisable under the circumstances.” (SDCZO 7164; See also, San Diego Navy Broadway Complex Coalition v. City of San Diego (2010) 185 Cal.App.4th 924, for the proposition that a decision will be deemed discretionary for purposes of CEQA when the agency has the ability to require mitigation for impacts identified in an environmental review document).

There can be no disputing that Site Plan review and approval shapes the project through the exercise of discretion by the Director, and therefore will require CEQA review.²

Generally speaking, CEQA applies to discretionary projects approved by public agencies. (California Public Resources Code (PRC) 21080(a)). As was shown above, both the Site Plan and Major Use Permit processes implicate discretionary review, and neither can be issued without CEQA being triggered.³

The primary question, then, is one of timing. For private projects, “approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project.” (CEQA Guidelines 15352(b), emphasis added). When considering whether an agency has committed to a particular use, courts typically deal with circumstances where an agency makes clear it will not allow an activity or development until some future point

² That a Major Use Permit approval is discretionary and subject to CEQA is so beyond controversy, the specific code provisions dictating as much need not be repeated here.

³ It should be noted, County staff expressly represented to the Planning Commission when it was hearing the Environmental Groups’ request for right to appeal that Covert Canyon would be subject to CEQA review as part of its future permitting.

*in time after CEQA review has been completed. The current situation is virtually unheard of, where the County **has already approved on an interim basis the very use (and impacts associated therewith) that are to be the subject of an admittedly discretionary future permit.** (See *Stand Tall on Principles v. Shasta Union High School District* (1991) 235 Cal. App.3d 772, 783). While the County can argue that future environmental review and the discretionary permitting process could result in denial of the permanent project, this would completely fail to address the temporary impacts that are permitted under the SAEO, and is therefore unlawful.⁴*

The CEQA guidelines define "project" to mean "the whole of an action" that may result in either a direct or reasonably foreseeable indirect physical change in the environment. (CEQA Guidelines 15378(a)). The "California Supreme Court has considered how to interpret the word 'project' and concluded that CEQA is 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora (2007) 155 Cal. App. 4th 1214,1223, quoting, Friends of Mammoth v. Board of Supervisors (1972) 8 Ca1.3d 247, 259). Agencies, therefore, are precluded from splitting larger projects into two or more segments or smaller projects, and putting off or avoiding CEQA review prior to implementation of one of the smaller segments. As one court put it, this ensures "that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences." (Burbank Glendale-Pasadena Airport Authority v. Hensler (1991) 233 Cal.App.3d 577, 592; Bozung v. LAFCO (1975) 13 Cal.3d 163,283-284).

Here, the County is clearly failing to define the project as both the temporary and permanent uses at Covert Canyon, and therefore approval of the SAEO without CEQA review amounts to illegal piecemealing. As noted prior, when courts have addressed issues related to the timing of environmental review and claims of piecemeal approvals, there have typically been questions regarding whether the preliminary approval commits the agency to a future course of action. Here, the future course of action is a component of the temporary use permitted via the SAEO! As such, the failure to conduct CEQA prior to its issuance is an abuse of discretion, a failure to proceed in a manner required by law, and an open invitation to litigation.⁵

⁴ Of further concern is the fact that the County will have inappropriately shifted the environmental baseline for the future environmental review such that the temporary uses become the starting point from which environmental impacts would be measured. (*Riverwatch v. County of San Diego* (2000) 76 Cal.App.4th 1428).

⁵ The County has not claimed, and indeed it cannot, that the SAEO qualifies for a Class 21 CEQA exemption. (CEQA Guidelines 15321). None of the prerequisites of that exemption apply.

The full extent of the County's consideration of CEQA compliance is a summary statement that, "The determination of use classification pursuant to Section 1220 of the San Diego County Zoning Ordinance is not a "project" as defined in the [CEQA] Guidelines Section 15378. The determination of use classification is an interpretation of the County Zoning Ordinance." County staff is sorely mistaken.

SDCZO 1008 empowers the Director to resolve ambiguities concerning the content or application of the zoning ordinance by ascertaining all pertinent facts and rendering a decision on the interpretation. However, there is absolutely nothing in section 1008 that makes such action ministerial or otherwise not subject to CEQA. Similarly, while SDCZO 1220 grants the Director authority to classify common uses according to use types, this activity (including the inclusion of such decisions on a prescribed "list") amounts to the exercise of discretion in the form of legislative activity, and therefore cannot occur without appropriate CEQA review.

There is no case, statute, or guideline that empowers the County to exercise substantial discretion and judgment to effectively legislate a definition of "Law Enforcement Services" that: (a) supplants the clear language of another zoning ordinance; (b) is inconsistent with historical interpretation of the SDCZO; and, (c) carries favor to the specific circumstances of an applicant long found in violation of the same compilation of statutes. No court will support the County's willingness to bend over backwards for this applicant, certainly not on the existing record.

Relying exclusively on the Director's powers contained in SDCZO 1220, staff claims that the determination that proper classification of the use of Covert Canyon is consistent with the Law Enforcement Services use type as described in ZO section 1346 is not a project. In essence, staff seeks to divorce its determination that law enforcement and military firearms training constitute Law Enforcement Services, from the specific factual circumstances surrounding the request from Covert Canyon. This back-room deal that would resolve years of claims of improper use by residents and the County is as it seems: an application by Covert Canyon for amendment of the Law Enforcement Services use to include those activities it has been illegally conducting on its property for years.⁶

Pursuant to California Public Resources Code section 21065 and CEQA Guidelines section 15378(a), a "project" includes an activity directly undertaken by a public agency that has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Such governmental activity includes legislative acts such as

⁶ The record is clear -- Covert Canyon, after years of violating the County's restriction on conducting training without a Major Use Permit, approached the County with the current, dubious scheme.

implementation and amendment of zoning ordinances, general plans, and administrative regulations. At question here is whether the Director is legislating an expansion of the Law Enforcement Services use, or merely interpreting an activity as consistent with the description of the use. He is clearly legislating.

The key question the court will ask in resolving this distinction is whether the environmental impacts associated with the new use were considered when the zoning ordinance in question was first passed. The County will be hard pressed to argue the plain reading of SDCZO 1346 indicates outdoor firearms training impacts throughout the backcountry were among those contemplated when the ordinance was adopted. Certainly, the County has not provided substantial evidence that this is the case.⁷

SDCZO section 1346 defines Law Enforcement Services as, “the provision of police protection by a governmental agency, including administrative offices, storage of equipment and the open or enclosed parking of patrol vehicles.” This definition does not leave much room for the flexibility of interpretation sought by Covert Canyon and the Director. From a facilities perspective, the “provision of police protection” is defined to include offices, storage, and parking. The County inappropriately seeks to expand the notion of police administrative offices to include long and short distance outdoor gun ranges. There is no substantial evidence in the record to support the notion that a typical police administrative office includes a gun range at all, let alone an outdoor range as contemplated by Covert Canyon.

Pursuant to SDCZO section 1220, “A list of common uses and the use types into which they are classified shall be maintained by the Director.” For SDCZO 1346, the list says “See Section for details” and references only “Police Stations (public)” as the type of facility that would qualify as Law Enforcement Services. As noted, the “details” in that section indicate only offices, storage, and parking qualify for the use. The County has claimed, with absolutely no evidentiary support, that firearms training facilities are a typical component of police stations and therefore within the Law Enforcement Services use. Appellants vehemently disagree, at least in part because if this was the case, the claim of need for private facilities like Halcon’s would have to be untrue.⁸

Further, there is nothing to suggest that the noise, habitat, fire danger, air quality, water quality, or other impacts that could occur from an outdoor range were ever considered when the general “administrative offices” description was inserted in the statute. Importantly, the ordinance defines the use as “including,” but does not

⁷ Counsel for appellants sent the County a request for all relevant evidentiary documents pursuant to the California Public Records Act. To the extent non-disclosed documents support a claim of substantial evidence to support the decision, they will not be allowed before the court.

⁸ Notably, for section 1350, there is listed *almost 90* different types of Major Impact Services and Utilities, reflecting an intent to capture a much wider variety of uses that require specific attention and conditioning, as would an outdoor firearms training facility.

include the typical phrase, "but not limited to." Nor does it say Law Enforcement Services "may include" the listed uses. The statute is clear, and the court will presume the County originally intended the description of compliant facilities to be limited to the finite list provided. Covert Canyon is not a police station. The County's effort must be called what it is: an expansion of the use beyond that written in the ordinance, or simply, an amendment.

Absent CEQA review, the County's legislative action is an abuse of discretion.

Appellants' Evidence

Submitted to the Planning Commission with the Williamses' appeal was a compendium of documents and photographs that add to the body of administrative record documents showing likely physical change to the environment and impacts associated therewith. All of these evidentiary submissions remain relevant to the current appeal to the Board of Supervisors. The documents generally show the following to be historically true, or likely to occur as a result of this and future approvals:

- Marc Halcon and Covert Canyon (collectively hereafter, "Halcon") have a long history of non-compliance with the Zoning Ordinance, and it is therefore likely Halcon will violate the SAEO in the future.
- Halcon has conducted commercial firearms training periodically since 2006 in violation of the Zoning Ordinance and multiple Administrative Enforcement Orders. Halcon's historic violations have resulted in physical change to the environment, and such changes will continue to occur with the increased volume of shooting expected to occur under the SAEO. The County has allowed the 2007 MUP permit process to languish for many years, and it is reasonable to expect that whatever subsequent permit or approval is sought by Covert Canyon, it will be years before CEQA review is ultimately conducted.
- Halcon has trespassed onto Cleveland National Forest lands and denuded such lands without appropriate permits. Halcon did not comply with conditions of the order purporting to resolve the trespass. County staff only followed up when notified by the Williamses' counsel. Halcon will continue to affect the physical environment of the National Forest via noise impacts, deposition of lead through overshooting, deposition of lead into groundwater, deposition of lead through storm water runoff, erosion impacts from increased traffic on the access road to Covert Canyon, continued habitat destruction adjacent to the access road.
- Halcon has illegally graded sensitive wetland resources and habitat in violation of the State and Federal Clean Water Acts. The soil dredged from the ponds has been used to create his firing ranges. Halcon's maintenance of the shooting ranges will result in continued and additional change to the physical environment.

- Outdoor shooting ranges have been found to cause impacts to land use, wildlife and biological resources generally, habitat, drinking and natural water quality, air quality, aesthetics, archeological resources, and humans due to noise, traffic, increased wildfire danger, and accidental bullet deflection. The evidence submitted regarding environmental impacts from outdoor shooting ranges apply to the Covert Canyon site. At the very least, they reflect reasonably foreseeable physical changes to the environment as a result of the SAEO.

Conclusion

Based on the aforementioned legal reasoning and evidentiary submissions, the SAEO should be rescinded immediately and the project put on hold until an appropriate CEQA determination can be made.

Sincerely,



Marco A. Gonzalez

Attorney for Robin and Clark Williams,
Coastal Environmental Rights Foundation,
Save Our Forests and Ranchlands, and
Cleveland National Forest Foundation